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IN THE

Supreme Court of the United States

October Term, 1958

No. 159

SAUL GELB, also known as SOL GORDIN,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Saul Gelb, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on June 17, 1959, denying his petition to vacate an illegal and void sentence, pursuant to Title 28, Section 2255.

Opinion Below

The opinion in the court below (Appendix A, *infra*) has not yet been reported.

Jurisdiction

The judgment of the court below was entered on June 17, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

1. Can a sentence of a District Court Judge placing the petitioner on Probation be overcome by a sentence of another District Court Judge for a crime committed prior to the probation and not in violation of the probation?

2. The extension of the statute of limitations became *ex post facto* while petitioner was in custody and the government had knowledge of his prior activities?

Statutes Involved

Section 3651, Title 18, U. S. Code.

SUSPENSION OF SENTENCE AND PROBATION.

Probation may be granted, whether the offense is punishable by fine or imprisonment, or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

Section 4203, Title 18, U. S. Code.

APPLICATION AND RELEASE; TERMS AND CONDITIONS.

a) If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with

the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

Such parolee shall be allowed in the discretion of the Board, to return to his home, or to go elsewhere, upon such terms and conditions, including personal reports from such paroled person, as the Board shall prescribe, and to remain, while on parole, in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced.

Section 3282, Title 18, U. S. Code (prior to amendment of September 1, 1954).

OFFENSES NOT CAPITAL.

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. June 25, 1948, c. 645, 62 Stat. 828.

Section 3282, Title 18, U. S. Code (as amended September 1, 1954).

OFFENSES NOT CAPITAL.

Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed (or if on such date prosecution therefor is not barred). As amended September 1, 1954, c. 1214 Sec. 10(a), 68 Stat. 1145.

Statement of Facts

The essential facts relevant to the present application are the three indictments to which the appellant Gelb has

entered pleas of guilty in the Southern District of New York, and the sentences imposed for the commission of these crimes.

The First Indictment

On April 8, 1954 Indictment C144-59 was filed in the Southern District of New York. It charged Gelb with five substantive violations of the federal narcotic laws, which he was alleged to have committed on March 4th and 5th, 1954.

Gelb entered his plea of guilty to these charges on May 5, 1954 and on the same day was sentenced to a term of five years imprisonment by the Honorable Sidney Sugarman.

The Second Indictment

On April 12, 1956, Indictment C150-30 was filed in the Southern District of New York. This was a two-count indictment charging the petitioner Gelb with the unlawful transportation of stolen bonds in interstate commerce, which acts according to the indictment were committed between January 1, 1950 to December 8, 1951.

Gelb entered his plea of guilty to the charges contained in this indictment on May 18, 1956 and on the same day was given a five-year suspended sentence and placed on five years probation by the Honorable Sylvester J. Ryan. The probationary period was ordered to commence at the expiration of the prison term Gelb was then serving on Indictment C144-59.

The Third Indictment

On October 23, 1957, Indictment C154-86 was filed in the Southern District of New York. This was a one-count indictment charging the defendant with conspiracy to violate the narcotic laws. The conspiracy was alleged to have continued from January 1, 1950 through and including May 1, 1955.

The indictment also alleged the commission of thirty overt acts in furtherance of the conspiracy. Saul Gelb was named as a participant in the second, sixth, seventh, eighth, ninth, tenth and eleventh overt acts as set forth in the indictments. The period of time covered by these seven overt acts were from October 24, 1952 to March 5, 1954. *The eleventh overt act alleged the same facts of the substantive offenses contained in Indictment C144-49.*

Additional Conceded Facts

Notwithstanding the defendant's plea of guilty on January 30, 1958, to Indictment 154-86, petitioner was continued in bail while on parole and probation until April 24, 1958 and he reported to his probation supervisor. The parole board at Leavenworth took no affirmative action to revoke parole.

On April 24, 1958 the Honorable Irving R. Kaufman imposed a five-year term of imprisonment and the $10,000 committed fine, remanded the petitioner.

The opinion of the court below, Judge Bryan, conceded that the petitioner did not violate probation nor parole nor was there an attempt made to revoke probation.

The government in its brief submitted to the Court of Appeals, Second Circuit. Conceded that the conspiracy charged to petitioner under Indictment 154-86 terminated on March 5, 1954.

On January 28, 1959 petitioner filed a motion to vacate and delare void this sentence. This motion was denied by Judge Bryan on May 12, 1959, and the Circuit Court of Appeals affirmed on June 17, 1959 on the opinion of Judge Bryan.

Statement

The issues presented in this case are novel and unique. There are no reported cases in any state or in this court concerning the facts herein. The unusual presentment of the indictments and the facts supporting the indictments brings to the fore for the first time the constitutionality of Section 3651, Title 18, passed by Congress in 1954.

Moreover, the facts, the indictments and the multiple sentences as presented here, will show a premeditated, deliberate, calculated intention on the part of the government to confine the defendant in a penitentiary for his natural life against his constitutional rights and in violation of due process. The parole and probation, given to the petitioner, gave him privileges of immunity from confinement if he complied with its terms. The privilege could become a vested right.

The action of the government in the presenting of the staggered indictments, assumed the risks of the court's sentences.

The failure on the part of Mr. Justice Edward Lumbard, a judge of the Court of Appeals, who was the United States Attorney on the return of indictment 144-59—to disqualify himself on the hearing of this application, was a denial of due process and basic principles of justice.

The confusion of the sentences, and the interruption of the parole and probation without a violation thereof, or a hearing was a further denial of due process. Your petitioner may only say that when the United States Government arrested him on March 5, 1954, they had knowledge of all the crimes that he had ever committed. They did not know whether to "fry him, broil him or sauté him." But they did all these three things to the petitioner in the handling of these indictments and in so doing, deprived petitioner of due process. The indictments which they presented, the sentences pronounced, complicated by the de-

cisions in the courts below present an issue of clarification to this court.

Unless his status is clearly defined, it will cause the petitioner additional legal expenses when he is released from his present illegal incarceration and will lead to a multiplicity of legal proceedings to determine his status, which should be presently decided by this court.

The reputation, character or conduct of the defendant should not enter into the court's decision.

REASONS FOR GRANTING THE WRIT

POINT I

The petitioner contends that his constitutional rights have been invaded and there has been a violation of due process. On March 5, 1954 the petitioner was arrested and charged with five counts in Indictment 144-59 with possession of narcotics and the overt acts therein alleged were committed on March 4 and March 5, 1954. It is interesting to note that though the petitioner was arrested on March 5, he is charged in this indictment with an overt act of possession on March 4, 1954. He was indicted on April 8, 1954 and on May 5, 1954 was sentenced by Honorable Sidney Sugerman for a period of five years on all counts to run concurrently.

The United States Attorney, on the date of sentence, pressed for a large sentence but notwithstanding his plea, the court gave the sentence as aforementioned. At the time of the sentence, Mr. Patterson from the United States Attorney's Office, which was then conducted by Circuit Judge Edward Lambard stated:

> "Mr. Patterson: He faces a number of charges as a result of the making of this case".

No action was taken by the government until April 12, 1956 when an indictment was returned against the peti-

tioner concerning overt acts committed between January 1, 1950 to December 8, 1951 on the charge of transporting stolen bonds in Indictment 150-30.

While in custody and on May 18, 1956 the petitioner pleaded guilty and was sentenced by Judge Ryan:

> "Sentence suspended, *probation for five years to begin upon his release from incarceration; probation subject to the standing probation order of this court*".

While the petitioner was incarcerated under the First Indictment he became eligible as a parolee under Title 18, Section 4203, Title 18, 4163 and 4164. His eligibility for parole under the good time statute became final and he was ready for release because of his good conduct in the penitentiary on November 14, 1957.

On October 23, 1957, about a month before his actual formal release from the penitentiary, subject to the supervision of the Parole Board, Indictment 154-86 was returned against this defendant, charging him with conspiracy to violate the narcotic law. He was one of forty-six defendants but the overt acts though numbered to thirty, commenced with January 1, 1950 and terminated with May 1, 1955. The defendant is charged with only seven acts and the last overt act charged against this defendant was March 5, 1954, being the very same act and the elements thereof as described in the indictment returned on April 8, 1954, namely, 144-59 (Government concedes—same act).

The defendant contends that when the Indictment 154-86 was returned to which he pleaded not guilty on November 14, 1957, he was then serving a sentence as a conditional parolee and that he then commenced to serve the sentence of Honorable Sylvester J. Ryan in Indictment 150-30. For under Title 18, Section 3651, the court had a right to impose a probation sentence and under the language and terms of the sentence of Judge Ryan the petitioner com-

menced to serve two sentences concurrently, the language of Judge Ryan's sentence falls clearly within the law enunciated in *U. S. v. Murray*, 275 U. S. 347. "Probation is not sought to shorten a term, probation is the attempted saving of a man who has taken a wrong step". On page 358, "the beginning of a service of a sentence in a criminal case ends the power of a court even in the same term to change it. Such a limit for probation is a natural one to achieve its end." And on page 359, the court stated further "it is true that there was but one day of execution of a sentence in the *Murray* case but the power passed immediately * * * and there had been one day of it served."

The petitioner contends that on October 23, 1957, the Parole Board at Leavenworth knew of indictment 154-86 notwithstanding this indictment, the petitioner was released as a conditional parolee on November 14, 1957.

Immediately, he commenced to serve his probation sentence of Judge Regan, imposed on May 16, 1956 under indictment 150-30.

The commencement of a sentence could not be interfered with or interrupted once it had commenced and surely it did commence when he enjoyed even one day of freedom. This occurred under the principles enunciated in the aforementioned case on November 15, 1957.

On January 30, 1958 the petitioner pleaded guilty to the Indictment 154-86 and the Court postponed sentence without date. Yet during the period from January 30, 1958 until April 24, 1958 even up to his present confinement, the defendant did not commit any crime, did not violate his probation, nor did the Parole Board upon his plea of guilty, revoke his parole. The reason that the Probation Board, as well as the Parole Board, did not take any affirmative action to revoke either, is because the acts charged in the Indictment 154-86 were not acts in violation of either parole or probation. The parole and probation which the

petitioner enjoyed was a privilege ~~not~~ to be a right ~~unless~~ ~~he obeyed~~ full compliance therewith. He had just commenced to serve his parole and probation and as the court conceded below in its opinion by Judge Bryan:

> "Judge Kaufman did not as defendant contends find him guilty of violation of probation granted by Judge Ryan, nor did Judge Kaufman revoke the probation nor attempt to modify."

In Title 18, U. S. Code Section 3653 and 3654, there is reference to revocation of probation and these sections are pertinent because the Congress of the United States has established a method for revocation of probation which coincides with much of the decisional law heretofore existing. It is a violation of the defendant's right of due process for him to be incarcerated while on probation where probation has not been revoked, nor an inquiry held to justify its revocation.

In *Escoe* v. *Zerbst*, 295 U. S. 490, page 494, the Court said:

> "Referring to a revocation of probation without a hearing, the attempted revocation is invalid for defect of power and with the suspension still continuing, the petitioner is entitled to a discharge from his confinement."

The Court stated further:

> "The defendant should be protected against malice or oppression * * * almost equally it is necessary if we read or write the thought of Congress for the good of probation system with its hope of social betterment."

What has happened here is that the petitioner was sentenced to a penitentiary term for an act committed prior to his probation. He did not violate his probation. He did nothing which would cause its termination, nor did the Court or the United States attorney make any effort to terminate the probation.

What is lacking here is a failure of proper legal process on behalf of the United States. If a hearing had been held, if after such hearing the Court had found it proper to revoke the probation—if there had been some effort at due process, the petitioner would have no complaint about his incarceration.

This denial of due process becomes more significant when we know that the act for which he is presently incarcerated occurred prior to the judgment of probation fixed by a Judge of the United States District Court. The subsequent sentencing was had while the petitioner was on probation. He in no way, violated its terms.

The court below relied on the cases of *United States ex rel. Demarois* v. *Farrell*, 8 Cir., 87 F. 2d 957, cert. den. 302 U. S. 683, rehearing den. 302 U. S. 775; *McGuire* v. *Warden, United States Penitentiary*, D. C. W. D. Penn., 122 F. Supp. 699. *Cf. United States* v. *Tacoma*, 2 Cir., 199 F. 2d 482.

The *Farrell*, *McGuire* and *Tacoma* cases referred to by Judge Bryan (32a) have no reference to this case since in all of these cases the crime was committed subsequent to the probation and while the defendant was on probation. The acts of the defendant in these cases referred to by the Court were a violation of the defendant's probation. Reference to them will make it imminently clear that in each, the probation sentence was revoked after appropriate hearing.

The government, by the return of the Indictment 154-86 on October 22, 1957, tried to give the impression that the return date of the indictment was when the crime charged to the defendant was committed. Again, the indictment must concern itself with the overt acts and the government conceded that from March 5, 1954 in its brief in the court below, and I quote:

> "Gelb was arrested on March 5, 1954. At that time his participation in the conspiracy charged in Indictment 154-86 concededly terminated".

From the facts herein and from the concession of the government there was no violation of parole or probation and the defendant was denied due process by his present continuous confinement in a federal penitentiary.

There is nothing in Judge Kaufman's judgment which makes the penitentiary sentence concurrent with the prior sentence of Judge Ryan. Therefore, Judge Kaufman's sentence must follow the probation, not toll it.

Assuming, *arguendo*, that the Court could overrule the probation sentence of Judge Ryan, then, in effect, we would arrive at a result where the defendant is faced with a probation occurring after his new penitentiary sentence. This, in effect, suspends the order of Judge Ryan and in further effect enlarges the sentence which he has imposed. This result is void for defect of power in the Court and it was so pointed out in *Frad* v. *Kelley*, 302 U. S. 312.

The petitioner on his release on November 14, 1957, from Leavenworth became a conditional parolee, and a probationer. A parolee and probationer may have these terms interrupted only if he commits a new distinct offense—not if the offense was committed prior to his parole and probation.

The Indictment 154-86, did not describe, a new overt act of petitioner. Though returned on October 23, 1957, related to petitioner's acts prior to his arrest of March 5, 1954, and prior to his incarceration.

Petitioner does not claim, as Judge Bryan contends that prior crimes were merged in the probation sentence.

But he does contend that on May 18, 1956, when he was sentenced by Judge Ryan, the Court should have been informed of his prior acts and conduct.

It must be conceded that petitioner, committed no offense since March 5, 1954. He was in the custody of the government.

They hoped for a consecutive confinement, sentence. Sentencing a criminal is a matter of judicial discretion, and may not be dictated by the prosecutor or the defendant.

Both parties are bound by the sentence. If the sentence, gives him immunity from confinement on terms, and conditions, and on probation it must be upheld.

The dissatisfaction of the sentence, must not be expressed, in the form of a new indictment, and a prison confinement. It must and should be in a hearing to revoke parole and probation.

If the court gave petitioner immunity, by the sentence of Judge Ryan, it must not be taken away without judicial process.

Mr. Justice Kaufman, in imposing sentence, under Indictment 154-86, on April 20, 1958, not only acted as a sentencing judge, but also as a parole board, and a probation review board. This was not his judicial function.

The petitioner was not given a hearing to revoke parole or probation, nor can it be deemed, that the hearing before Mr. Justice Kaufman was a hearing to revoke probation.

For 2½ years the defendant was incarcerated and they took no action based on the statement of the government, because the government was determined to keep this man confined in prison. He is still a human being with rights, and the fundamental principles of due process.

POINT II

From the foregoing facts and from the concessions made by the government, the petitioner had withdrawn from the conspiracy on March 5, 1954. On that date, Title 18, Section 3282 was in force at that time and stated that offenses in capital must be prosecuted and tried within three years. This section was amended on September 1,

1954 to increase the period to five years. The petitioner was incarcerated on May 5, 1954 and was not released until November 23, 1957 and was within the custody, care and control of the federal government. They not only knew of the whereabouts of this petitioner, but had full knowledge of all his activities as expressed in the statement of Mr. Patterson on May 5, 1954:

> "Mr. Patterson: Yes. He faces a number of charges as the result of the making of this case."

The defendant was in custody for the crime for which he was later indicted in 1957. While the statute of limitations is not a vested right, the change in the law under these circumstances is in exculpation of a defense which existed in March, 1954.

Reference to the decisional law is not helpful. The Court have dealt with cases where the defendant was not in custody prior to the change in the statute, or at least not in custody by Federal authorities.

The ineptness in the failure of counsel to plead such defense on defendant's behalf should not impose a penalty upon the defendant. The United States Attorney's office knew of the acts which constituted the crime.

The delay in indicting the defendant for three years is not in conformity with our concept of justice and the propriety of its administration.

Concededly, delays enabling the government to perfect its proof cannot be avoided. Here, the government announced in open court that it had the requisite evidence. To then wait 3 years tramples the guarantees of speedy trial.

The court below relies on *U. S. v. Reinie*, 242 Fed. 2 302, where the court held:

> "Once it is shown that a person has become a party to a conspiracy the law presumes he remains a party while it continues."

This contention is negatived by the government brief submitted on June 10, 1959 in the Circuit Court of Appeals.

> "Gelb was arrested on March 5, 1954. At that time his participation charged in Indictment C154-86 concededly terminated". (p. 9 of brief)

The petitioner, by his confinement and from the facts herein adduced was no longer part of the conspiracy. In *U. S.* v. *Rolen*, 173 Fed. 459:

> "Where conspirators are acting together for a common purpose comprehended to a scheme, limitations begin to run from the last overt act, except as to the conspirator who has withdrawn from the scheme."

Thus, the government had custody of the petitioner, knowledge of his activities, his known withdrawal from the conspiracy. Yet they insist that the 5-year amendment applies to petitioner. Is this not an *ex post facto* law as to him?

The Congress, in the amended law, stated, "if on such date prosecution is not barred."

Yet here, the custody of the defendant is important. As stated in *U. S.* v. *Satz*, 109 Fed. 94:

> "Statutes of limitation are matters of repose and should be liberally construed in favor of the defendant."

The three-year statute should apply to petitioner.

The court below, by Judge Bryan in his decision, went so far as to say that a plea of guilty to an indictment covers every overt act alleged therein. The indictment below was on a single count of conspiracy and how can the court state that a man can plead guilty to overt acts when he had withdrawn from the conspiracy; had been in the custody of the federal government and make an admission by saying the word "guilty" he admits to facts of which he had no part or parcel.

POINT III

The reputation, the character or conduct of the defendant should not obliterate the propriety of his position and legal efficacy and merit of defendant's application for release. The last act chargeable to this defendant occurred on March 5, 1954 which is supported by a concession of the government and from the facts set forth in the indictment. If all the facts were known to the government prior to his confinement on March 5, 1954, the petitioner herein should have been granted a hearing to determine these issues. This is an application of a coram nobis, though labelled a petition to correct an illegal sentence if facts are presented that create an issue, the court must assist the petitioner for available means to correct an injustice. There were such issues here.

Judge Edward Lumbard was the United States Attorney when the defendant was arrested and was the United States attorney for some time prior thereto. When this petitioner came before the Court of Appeals the failure of the judge to disqualify himself in the argument of this motion, was prejudicial to this petitioner, and was a denial of due process. His office was being questioned as to certain facts.

An issue was created by the statement of the United States Attorney at the sentence on May 5, 1954. This was borne out by the subsequent indictment and while the petitioner was in their custody and by the concessions and knowledge of the government of petitioner's activities.

All of the overt acts in the following indictments, were prior to March 5, 1954, and not later.

There were triable issues of fact and questions of laches on the part of the government to be tested on the hearing if granted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

(Opinion of United States Court of Appeals, for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1958.

(Argued June 1, 1959 Decided June 17, 1959.)

Docket No. 25685

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAUL GELB, also known as SOL GORDIN,

Appellant.

Before:

CLARK, *Chief Judge*, and
LUMBARD and WATERMAN, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Frederick van Pelt Bryan, *Judge*.

Saul Gelb appeals from an order denying his motion under 28 U. S. C. § 2255 and Fed. R. Crim. P. 35 to vacate

a sentence of imprsonment on plea of guilty to a narcotics charge because at the time he was on parole for another crime and awaited probation on still another crime, or alternatively because the statute of limitations had run.

HARRY SALVAN, New York City, for appellant.

HERBERT F. ROTH, Asst. U. S. Atty., S. D. N. Y., New York City (S. HAZARD GILLESPIE, JR., U. S. Atty., and KEVIN THOMAS DUFFY, Asst. U. S. Atty., New York City, on the brief), for appellee.

PER CURIAM:

Affirmed on the opinion of District Judge Bryan, D. C. S. D. N. Y., May 12, 1959.

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Pinkerton v. *United States*, 328 U.S. 640 — 9

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Strand v. *Schmittroth*, 251 F. 2d 590, certiorari dismissed on motion of petitioner, 355 U.S. 886 — 8

United States v. *Farrell*, 87 F. 2d 957, certiorari denied, 302 U.S. 683 — 9

United States v. *Fenno*, 167 F. 2d 593, certiorari dismissed on stipulation of counsel, 335 U.S. 806 — 8

United States v. *Murphy*, 217 F. 2d 247 — 8

United States v. *Reina*, 242 F. 2d 302 — 10

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Statutes and Rule:

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. [illegible]

SAUL GELB, ALSO KNOWN AS SOL GORDIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. 19–20; R. 36–37) and the district court (R. 30–34) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1959 (R. 38). The petition for a writ of certiorari was filed on June 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fact that a person is on probation for one offense precludes his being sentenced to imprisonment for a separate offense committed before the prior conviction.

2. Whether the petitioner could raise on collateral attack the issue that his prosecution was barred by the statute of limitations, and, if so, whether the statute had run.

STATUTES AND RULE INVOLVED

The probation statute provides in pertinent part:

18 U.S.C. 3651.

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> * * * * *
>
> The court may revoke or modify any condition of probation, or may change the period of probation.
>
> The period of probation, together with any extension thereof, shall not exceed five years.
>
> * * * * *

18 U.S.C. 3653.

> * * * * *
>
> At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court

for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

18 U.S.C. 3282, prior to the amendment of September 1, 1954, provided:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.

Section 10 of the Act of September 1, 1954, 68 Stat. 1142, 1145, amending 18 U.S.C. 3282 (18 U.S.C. (Supp. V) 3282), provides:

> (a) Section 3282 of title 18 of the United States Code is amended by striking out "three" and inserting in lieu thereof "five".
>
> (b) The amendment made by subsection (a) shall be effective with respect to offenses (1) committed on or after the date of enactment of this Act, or (2) committed prior to such date, if on such date prosecution therefor is not barred by provisions of law in effect prior to such date.

Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides:

> *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

STATEMENT

The petitioner has pleaded guilty at different times to three separate indictments (Exs. A, B, and C).[1] This proceeding involves the validity of the sentence under the third indictment, which he is now serving. The pertinent facts are, as follows:

On May 5, 1954, the petitioner pleaded guilty to a five-count federal indictment charging substantive violations of the narcotics laws committed on March 4 and 5, 1954. On the same date, District Judge Sidney Sugarman sentenced him to imprisonment for five years on each count, to run concurrently, and a committed fine of $2,000 on count one. (Ex. A; R. 5–6, 21–22.)

The second indictment, returned on April 12, 1956, while the petitioner was serving the sentence on the first indictment, was in two counts charging him with unlawful transportation of stolen bonds in interstate commerce, in violation of 18 U.S.C. 2314. The petitioner pleaded not guilty to this indictment on April 23, 1956, but on May 18, 1956, he changed his plea to guilty. On the latter date, District Judge Ryan sentenced him to imprisonment for five years on each count, to run concurrently, but execution of the sentence was suspended and he was placed on probation for five years to begin upon his release from incarceration under the sentence he was then serving. (Ex. C; R. 7, 22.)

[1] The record consists of the petitioner's appendix filed in the court of appeals, supplemented by the proceedings in that court. The three exhibits referred to are not printed. Each consists of an indictment returned against the petitioner and part of the docket entries applicable to such indictment.

On November 14, 1957, having served the five-year sentence imposed on May 5, 1954, less good-time deductions, the petitioner was released from confinement (R. 7, 23). By operation of law, however, he was subject to parole under that sentence "until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days" (18 U.S.C. 4164).

Meanwhile, the third indictment had been filed on October 23, 1957. It charged the petitioner and 45 others with conspiracy from January 1, 1950, through May 1, 1956, to violate the narcotics laws, to defraud the United States of its right to have the Customs Service administered free of corruption, and to bribe employees of the Customs Service. The indictment also alleged the commission of thirty overt acts in furtherance of the conspiracy. The petitioner was named as a participant in the second, sixth, seventh, eighth, ninth, tenth and eleventh overt acts, which covered the period from October 24, 1952, to March 5, 1954. The eleventh alleged the facts of certain of the substantive offenses charged in the first indictment. The petitioner pleaded not guilty to this indictment on October 28, 1957, but on January 30, 1958, he changed his plea to guilty. (Ex. B.) On April 24, 1958, following the trial of nineteen of his co-defendants and the convictions of eighteen of them on March 18, 1958, the petitioner was sentenced by District Judge Kaufman to imprisonment for five years and a committed fine of $10,000 (Ex. B; R. 9, 22, 31).

The present proceeding arose on January 28, 1959, when the petitioner filed a motion to vacate the third indictment and the sentence thereon. He claimed, *inter alia*, that upon his release from imprisonment under the sentence imposed on the first indictment, the sentence of probation which Judge Ryan had imposed on the second indictment immediately became operative, and that the third sentence imposed by Judge Kaufman is therefore invalid because it amounted to a revocation of probation without a hearing or proof that he had violated any of the conditions of probation. (R. 2–19.) After a hearing, District Judge Bryan denied the motion. He held that this contention, as well as others not now pertinent, and a further contention that the third indictment was barred by limitations,[*] were without merit (R. 30–34).

The court of appeals affirmed, *per curiam*, "on the opinion of District Judge Bryan" (R. 37).

ARGUMENT

1. There is no merit in the petitioner's contention that, because the sentence of probation which Judge Ryan had imposed was by its terms operative, Judge Kaufman had no authority to impose the imprisonment sentence the petitioner is now serving (Pet. 7–13). We do not quarrel with the petitioner's premise that he was on probation at the time this sentence was imposed. But, as the courts below held, the petitioner's probationary status in no way impinged upon the authority of Judge Kaufman to sentence him on

[*] This contention was not specifically urged in the motion. Apparently it was raised on the argument before Judge Bryan.

his plea of guilty to the third indictment. The petitioner cites no authority for the proposition that his status immunized him against imprisonment for an offense which he committed prior to the time he commenced service of his probation. On the contrary, the cases hold that a probationer may be sentenced to imprisonment in such circumstances. See *United States* v. *Fenno*, 167 F. 2d 593 (C.A. 2), certiorari dismissed on stipulation of counsel, 335 U.S. 806; *United States* v. *Murphy*, 217 F. 2d 247 (C.A. 7); *Strand* v. *Schmittroth*, 251 F. 2d 590 (C.A. 9), certiorari dismissed on motion of the petitioner, 355 U.S. 886.

By the same token, the petitioner's contention that Judge Kaufman's action in sentencing him amounted to a revocation of his probation without a hearing or showing of a violation of its terms must fall. There was no claim that the petitioner had violated probation during the short period between his conditional release from imprisonment under the first sentence and his commitment under the present sentence, and no proceeding looking toward revocation of probation, as required by the probation statute (*supra*, pp. 2–3), was instituted. Hence, the present sentence did not purport to and did not have the effect the petitioner asserts it has.

The petitioner's ancillary argument that the present sentence has the effect of tolling the probationary period, in derogation of the terms of the probation sentence, raises only a question as to the time of service of that sentence and does not affect the legality of his present incarceration. The courts below did

hold (R. 32, 37) that the probationary period is tolled, citing *United States* v. *Farrell*, 87 F. 2d 957, 962 (C.A. 8), certiorari denied, 302 U.S. 683; *McGuire* v. *Warden, etc.*, 122 F. Supp. 699 (W.D. Pa.); and *United States* v. *Tacoma*, 199 F. 2d 482 (C.A. 2). It is true, as the petitioner says (Pet. 11), that these cases each involved a new crime committed while the defendant was on probation. Here, on the other hand, the petitioner has not been charged with a violation of probation and there has thus been no occasion for a determination that the suspended sentence Judge Ryan imposed on the second indictment should be executed. Accordingly, it was unnecessary for Judge Kaufman to fix the order of service of the suspended sentence in relation to the imprisonment sentence he imposed. In any event, at best, from the petitioner's standpoint, the probation sentence may be running concurrently with the sentence he is now serving (cf. *Sanford* v. *King*, 136 F. 2d 106 (C. A. 5)). In either case, whether the petitioner is now serving his probation or must serve it after his release from imprisonment, he has no standing to attack the present sentence.

2. The petitioner's contention that the third indictment was barred by limitations (Pet. 13–15) is frivolous. In the first place, it was waived by his failure to raise it by a pre-trial motion under Rule 12(b)(2) of the Federal Rules of Criminal Procedure. Secondly, even on the petitioner's hypothesis that his participation ended with his arrest on March 5, 1954, and that this was sufficient to show an affirmative withdrawal on his part (cf. *Pinkerton* v. *United*

States, 328 U.S. 640) so as to start the running, as to him, of the then three-year statute of limitations, this does not help him. For just six months after his claimed withdrawal, *i.e.*, on September 1, 1954, the period of limitations was enlarged from three to five years (see pp. 3–4, *supra*) and Congress specifically provided that the enlarged period should apply to offenses not already barred by the prior three-year statute. Thus, the period of limitations applicable on the petitioner's hypothesis extended, not to March 1957, as he claims, but to March, 1959, and the indictment was returned before the latter date. The validity of this provision of the statute amending the old statute of limitations is not open to doubt. See *Grunewald* v. *United States,* 353 U.S. 391, 396, fn. 9; *United States* v. *Reina,* 242 F. 2d 302, 305 (C.A. 2); *Falter* v. *United States,* 23 F. 2d 420, 425 (C.A. 2), certiorari denied, 277 U.S. 590.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1959

No. 159

SAUL GELB, also known as SOL GORDIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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REPLY BRIEF

Point I

This case is a conflict between Government and petitioner whose basic rights are guaranteed by the United States Constitution. The actions of the Government in this case are arbitrary, unfair and with a malicious calculation.

The respondents through their brief and by their arguments and reasoning practically concede facts and the contentions of the petitioner for the relief he requests. Yet they avoid the real issues.

(a) Is the petitioner illegally detained?

(b) Can he serve a probation in jail in violation of 18 U. S. C. 3651 and 3653?

There are three separate indictments and three staggered sentences which arise out of and from the Southern

District of New York, and each of the sentences were imposed by judges of equal rank and authority. They also concede that petitioner was serving his parole and probation when he was sentenced by Mr. Justice Kaufman on April 28, 1958 (pp. 7, 11, 24-26), and, in addition, they concede that there was no violation of either; page 8, lines 16-23. They admit that there was no hearing to revoke parole or probation pursuant to 18 U. S. C. 3653.

It must also be noted that the Federal District Court, Southern District of New York, had jurisdiction of the petitioner from 1954 until the present date. During this period there was no formal release or surrender by

(a) the Parole Board,

(b) Probation Department or

(c) the consent of the Attorney General to relinquish, vacate, modify or withdraw the sentence of the Honorable Justice Ryan.

The sentence of Mr. Justice Kaufman on April 28, 1958 being a third sentence for a crime committed prior to parole and probation and by its terms of immediate confinement and by its failure to take into account the petitioner's parole and the sentence of Mr. Justice Ryan who sat with equal rights and authority in the same court, that the sentence of Judge Kaufman was in effect

(a) a revocation of probation without a hearing;

(b) tolled the sentence of Mr. Justice Ryan, and

(c) by its uncertain language and the omission of the words "concurrent or consecutive" must by the decisions of this court be only a concurrent sentence with that of Mr. Justice Ryan.

If the sentence of Mr. Justice Kaufman is concurrent, it cannot be one of confinement because the prior sentence is one of probation. If it is consecutive, then he is illegally

detained because the sentence of Mr. Justice Ryan of May 1956 must take priority because it is prior in time and prior in right.

It is also worthy to note that a sentence without definite language of the word "consecutive" must be deemed "concurrent."

The cases cited by the respondent, *U. S.* v. *Fenno*, 167 Fed. 2d 593, *U. S.* v. *Murphy*, 217 Fed. 2d 242, have no application to the within facts. A reading of these cases will reveal that there was a question of comity between the Federal Government and the State. The court held that the dignity of the state must not be breached and in each case the Federal Government voluntarily surrendered the defendant who could not question the rights of a sovereignty to prosecute for the crime. As a matter of fact, the court in both of these cases said:

> "It may be that where the second court obtains custody of a probationer in the absence of the express consent of the first court, it does so wrongly. This we need not decide."

Surely there is a serious question which has to be determined by this court.

Moreover, in the instant case, the petitioner committed crimes only against the Federal Government and was always within the jurisdiction of the Federal Court of the Southern District of New York. The position of petitioner is sustained in the case of *Grant* v. *Guernsey*, 63 Fed. 2d, p. 163, cert. den. by this court in 289 U. S. 744, where the court said:

> "There can be no doubt Guernsey was under the jurisdiction of the Federal Court subject to its orders under the probation statute at any time."

and the case states and cites: *Taylor* v. *Taintor*, 16 Wall. 366:

> "The tribunal which first gets its hold to the exclusion of the other until its duty is fully performed and

> the jurisdiction invoked is (exhausted) and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to a person or thing it is * * * unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

Here a Federal Court judge of the Southern District of New York issued a mandate and a sentence and within two years the same is overruled, abolished and extinguished by a judge of equal rank and power without a hearing and in violation of due process.

The sentence of Judge Ryan of May 18, 1956 was five years, suspended; on probation, to commence upon his release from incarceration he was then serving, subject to any other outstanding probation of this court. This sentence was operative but never allowed to be carried out by the actions of the Government.

In April 1956 when the Government returned Indictment 150-30 against the petitioner, they did not need any more information or investigation to prosecute the petitioner under Indictment 154-86. For they knew of all his activities because he was in their custody from May 5, 1954. Whether they needed more time to embrace the other defendants in the same indictment, was a matter of choice. In any event all the acts of the conspirators, including petitioner, had been completed *by May 1955*. If they had returned Indictment 154-86 on or before May 1956 and prior to the sentence of Mr. Justice Ryan, there would be no problem. It is obvious the petitioner, having pleaded guilty to the Indictment 144-59 in 1954 and the overt acts set forth in Indictment 154-86 were the same as in the previous indictment, the defendant had no way out but to plead guilty. However, the Government wanted to confine this petitioner to an institution for his natural life at any cost or calculation. Their plans and calculations went astray when they presented Indictment 150-30 and by reason of the sentence of

Mr. Justice Ryan on probation and suspension, they became disappointed and started a course of harassment.

The case cited by the respondent, *United States* v. *Murphy*, 247 Fed. 2d 247, states (p. 251):

> "The Report of the Special Committee of the Judicial Conference of the United States on Probation:
>
> 'Your Committee finds it difficult to reconcile with the theory behind probation a sentence under which the offender serves a term in prison and after his release commences a period of probation. It would seem that if the present prison sentence is justifiable, then probation is not and if probation is desirable, then the jail sentence is a mistake.'"

Thus we have a situation so aptly described in the foregoing case. If the petitioner is serving his probation in jail or it may be that he is to serve it after the jail sentence, then actually the actions of the Government were in direct contravention of 18 U. S. C. 3653 and the very basic principles of probation law.

The defendant does not say or claim immunity by reason of the sentence of Mr. Justice Ryan. He admits that he must be sentenced by his plea of guilty to Indictment 154-56, but any sentence to be imposed by this court must be subject to the sentence of parole and probation which he was then serving. A third sentence may not interrupt the sentence the petitioner is serving without cause or hearing. The petitioner was always within the jurisdiction of the Federal Court and under their supervision.

How can the Government contend that it was unnecessary for Judge Kaufman to consider the sentence of Judge Ryan? They both are judges of equal rank, sitting in the same court and there is no admission or concession that the sentence of Judge Ryan was either eliminated, extinguished or terminated. The petitioner contends that he must serve each sentence as it is imposed, but he may not have it interrupted, tolled or suspended without a violation.

Point II

The *Grunewald* case cited by the respondent, which is good law, is not applicable to the facts herein. In the instant application, the conspiracy as charged to the petitioner was concededly terminated on March 4, 1954. This is by the Government's own contention and by the facts supporting his position here. The Government then had custody of the petitioner from May 1954 until November 1957. The statute of limitations changed on September 1, 1954, which extended the limitations to five years. The Goverment cites *Faiter* v. *U. S.*, 23 Fed. 2d 420. The court therein stated:

> "For the state to assure a man that he has become safe from its pursuit and thereafter to withdraw its assurances seems to most of us unfair and dishonest."
>
> • • •
>
> "But while the chase is on, it does not shock us to have it extended beyond the time first set."

In the facts here, the last quote is more applicable to the petitioner. He had committed all the crimes he was ever going to commit because of his confinement to a federal penitentiary. The knowledge of the petitioner's criminal activities, his custody within the confines of a federal penitentiary, and knowledge by the Federal Government presents a situation that Congress did not contemplate when it amended Section 18, U. S. C. 3282. For this petitioner is protected by the Constitution of the United States. On this point; Congress may not pass an *ex post facto* law. The act of Congress itself is not *ex post facto* in general.

As to this petitioner under the unusual facts, it is an *ex post facto* law because the Government had knowledge of the completion of a criminal act and custody by the authorities is sufficient to give this petitioner the benefit of the shorter period of the statute of limitations.

As far as this petitioner was concerned, the chase was over, he had completed his criminal act; he was in custody, and the Government had full knowledge of the crime of conspiracy to violate the law. Therefore, laxity on the part of the Government in allowing more than three years to elapse, since the commission of the crime, was an injustice and a failure to give the petitioner a speedy trial in violation of his constitutional rights.

The sentence which was imposed by the District Court between his confinement and his release as not an act of his own choice. The Government presented an indictment and the petitioner received his sentence which should be carried out to its conclusion.

Point III

Title 28, Sec. 2255 is in the form of a *coram nobis* proceeding. It is an application afforded to a prisoner that goes beyond the indictment and legal technicalities. The failure of the attorney to plead the defense of statute of limitations should not be a bar to the present application. The ineptness in the failure of counsel to plead such a defense should not impose a penalty upon the petitioner. It becomes unjust and inequitable to allow the Government to keep the defendant incarcerated for more than three years before it decides to return an indictment which on its face falls within the statute of limitations. There was definitely a calculation on the part of the Government to confine the defendant for the rest of his natural life by arbitrary and capricious methods. If individuals were not protected by a Constitution and by this court, prosecutors would run rampant and undermine our basic principles of justice enjoyed in our democracy.

The petition for certiorari should be granted.

Respectfully submitted,

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